Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Improving Public Safety Communications In the 800 MHz Band	)	WT Docket No. 02-55
	)	
Consolidating the 800 and 900 MHz Industrial/ Land Transportation and Business Pool Channels To Allocate Spectrum Below 3 GHz for Mobile And Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Services	)	ET Docket No. 00-258
	)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service	)	RM-9498
	)	
Petition for Rule Making of UT Starcom, Inc. Concerning the Unlicensed Personal Communications Service	)	RM-10024
	)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by The Mobile Satellite Service	)	ET Docket No. 95-18

To: The Commission

JOINT PETITION FOR PARTIAL RECONSIDERATION OF COASTAL SMR NETWORK, L.L.C./A.R.C., INC. AND SCOTT C. MACINTYRE

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December 22, 2004

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SUMMARY

With the best of intentions, the Commission adopted a new 800 MHz band plan to solve an important public safety interference problem. Indeed, the Commission's decision is a major step forward in many respects. Consequently, this Joint Petition seeks only partial reconsideration and does not challenge: (1) the Commission's recognition of a long-standing and growing interference problem in the 800 MHz Band with an adverse impact on Public Safety users; (2) the Commission's decision to utilize a two-pronged approach to address the interference problem; and (3) the Commission's finding that the 1.9 GHz spectrum is the most viable and best option to facilitate the restructuring of the 800 MHz Band.

However, the new 800 MHz band plan is built on a faulty foundation, and, unless it is repaired, the Commission's noble objectives will not be achieved. The Commission's decision will fail to meet the expectations of the public safety community, harm competition in the commercial mobile radio service market, and spawn time-consuming and costly appeals. Therefore, the Joint Petitioners request that on reconsideration the Commission: (1) conduct the proper engineering analysis and make it public; (2) ensure that adequate spectrum is allocated to provide a sufficient degree of service replication for all the affected 800 MHz licensees; and (3) adopt a band plan without the unlawful preferential features of the current plan that benefit Nextel and Nextel Partners. An even-handed treatment of all incumbent SMR licensees, including Nextel and Nextel Partners, is in the public interest and is required by law. The Joint Petitioners request that they be permitted to share in the same benefits and burdens as Nextel in a revised band plan based on a solid foundation of engineering analysis that illuminates the actual coverage-area outcomes of the transition.

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Coastal SMR Network, L.L.C. and its affiliates[1] ("Coastal/A.R.C."), licensees of 27 EA and 138 high-site Specialized Mobile Radio Service ("SMR") authorizations in the Mid-Atlantic region, and Scott C. MacIntyre, the licensee of three EA licenses and the holder of non-

[1] Commercial Radio Service Corp. and A.R.C., Inc. d/b/a Antenna Rentals Corp. A listing of the licenses held by these entities is available as Exhibit A to the Comments filed December 2, 2004, by Coastal (attached hereto as Exhibit One).

controlling interests in entitles holding four EA licenses and six high-site SMR licenses (collectively, the "Joint Petitioners"), by their attorneys, hereby submit this Joint Petition for Partial Reconsideration ("Joint Petition") of the Report and Order ("*Report and Order*") in the above-captioned proceedings (the "*800 MHz Rebanding*"), adopting rules for the relocation of Public Safety and non-Public Safety licensees in the frequencies 806 to 824 MHz and 851 to 869 MHz (the "800 MHz Band").[2] Coastal/A.R.C. recently filed Comments in response to the Public Notice released by the Commission on October 22, 2004 in this proceeding.[3] The Joint Petitioners hereby incorporate those Comments in this Joint Petition by reference. In sum, Coastal's Comments stated: (1) the newly-adopted band plan thwarts Nextel's competitors (including Coastal) who plan to "cellularize" their existing SMR systems; and (2) the proposals in Nextel's further *ex parte* submissions affecting the placement of incumbents (other than Nextel, Nextel Partners, and SouthernLINC) should not be adopted because they would only sharpen the inequities in the new band plan.

This Joint Petition for Partial Reconsideration has a three-fold purpose: (1) to seek redress of the major technical infirmities in the *800 MHz Rebanding Report and Order*; (2) to seek redress of major legal and procedural infirmities in the adoption of the *800 MHz Rebanding Report and Order*; and (3) to advocate a solution to these technical, legal and procedural infirmities that will preserve the intended benefits to Public Safety while correcting gross inequities in the treatment of all the adversely-affected non-Nextel/SouthernLINC SMR licensees.

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[2] *See Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, et. al, FCC 04-168 (rel. August 6, 2004) ("*Report and Order*").

[3] *See* Comments of Coastal SMR Network, L.L.C., filed December 2, 2004 (attached hereto as Exhibit One)..

I. THERE IS NO RATIONAL BASIS TO CONCLUDE THAT THE SPECTRUM ALLOCATED FOR THE NEW 800 MHZ BAND IS ADEQUATE TO AVOID SERVICE DEGRADATION

The *Report and Order* describes the new band plan adopted by the Commission in a manner that obscures a material fact: the Commission lacks a rational basis for concluding that the spectrum allocated for the new band plan is adequate to avoid service degradation. The answer to the question of whether, and to what extent, existing Public Safety, CII, B/ILT and SMR service will be fairly replicated for all affected licensees after the transition remains completely unknown. While the Commission says that it is "committed to ensuring that band reconfiguration will not result in degradation of service,"[4] the *Report and Order* promises "comparable facilities."[5] In fact, the Commission recognizes a spectrum shortfall in Paragraph 164 of the *Report and Order*, which states:

> We are aware that, in some markets, there may be insufficient spectrum in the 816-824 MHz/861-869 band segment to accommodate both incumbent ESMR licensees already operating there and new ESMR entrants migrating from the lower channels.

Public Safety licensees, CII licensees, B/ILT licensees, and SMR licensees may optimistically interpret the Commission's commitment as being one of "service replication." However, the Commission knows that a standard of "service replication" is materially different from "comparable facilities." "Comparable facilities" essentially means "comparable equipment" – not necessarily a high degree of service area replication. It is relatively easy to satisfy a promise of comparable facilities, while completely failing to deliver service replication. Even if the comparable facilities standard includes "comparable coverage," comparable coverage

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[4] *Report and Order* at ¶ 148.

[5] *See Report and Order, Appendix C,* § 90.677(f).

is not "service replication." In sum, a Public Safety licensee, a CII licensee, a B/ILT licensee, or an SMR licensee may receive comparable facilities *without* being able to replicate its current geographic service area contour. Either there is no justification for such optimism, or the Commission must clarify its intentions regarding service replication.

To determine whether the spectrum allocated is adequate to achieve service replication, and to determine where any shortfalls would occur, substantial engineering analysis is required – far beyond anything in the public record of these proceedings. The Commission is quite capable of such analysis; it conducted such analysis in other recent proceedings involving a spectrum allocation overlay in another interference-limited service – the broadcast television service. Indeed, the Commission is capable of modeling the outcome of the *800 MHz Rebanding* and publishing a new table of channel allotments for all affected licensees to review, just as it modeled the outcome of the DTV transition for television broadcasters. Under such an approach, the new table of frequency assignments would include statistics describing the degree of service replication both in geographic and demographic terms.

There is no explanation in the *Report and Order* for why the Commission departed from its customary practice of conducting such an engineering analysis to support its conclusions. To justify the departure from sound engineering analysis on grounds that there is a public safety imperative is illogical. The outcome directly affects public safety and the technical aspects should be thoroughly understood before sweeping changes are made. Further, to justify the lack of sound engineering analysis on grounds that the Commission does not have the data to conduct the analysis is an irresponsible dereliction of duty. The frequency coordinators whose cooperation would permit the Commission to undertake such an assessment are known to and

sanctioned by the Commission, and as a result, all of the necessary data is available upon request.

These technical infirmities are such that the Commission could not fairly claim to have made a rational decision in this matter, as required by the Administrative Procedure Act, 5 U.S.C. § 500, *et seq.* ("APA"). It is true that the courts have afforded substantial deference to the Commission's discretion in its consideration of technical matters.[6] However, the factual basis underlying the Commission's decisions in this proceeding is so fundamentally inadequate that the Commission will be unable to "cogently explain why it has exercised its discretion in a given manner."[7] The Commission's explanation must be sufficient to enable a reviewing Court "to conclude that the [agency's action] was the product of reasoned decisionmaking."[8] In the absence of adequate engineering analysis, the new band plan can only be characterized as arbitrary and capricious, and an abuse of discretion, in violation of 5 U.S.C. §706(2)(A).

II. THE JOINT PETITIONERS COULD NOT MEANINGFULLY PARTICIPATE IN THE RULE MAKING PROCEDING WITHOUT ADEQUATE NOTICE OF THE IMPACT OF THE PROPOSED REBANDING

The *Notice of Proposed Rulemaking* in this proceeding does not meet the requirements of the Administrative Procedure Act's Section 553.[9] The Commission failed to apprise the Joint Petitioners and any other affected licensee of the impact on current service resulting from the proposed reconfiguration of the 800 MHz band. Even the *Report and Order*

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[6] *See* Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984); Atlantic Tele-Network, Inc. v. FCC, 59 F.3d 1384, 1389 (D.C. Cir. 1995).

[7] Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48 (1983)

[8] United States Telecom Ass'n v. FCC, No. 99-1442, (D.C. Cir. 2000), *citing* A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1491 (D.C. Cir. 1995).

[9] *See Improving Public Safety Communications in the 800 MHz Band, Notice of Proposed Rulemaking*, FCC 02-81 (rel. March 15, 2002) ("*Notice*").

fails to provide that information. Moreover, there is insufficient information for interested parties to conduct their own independent engineering analysis of the outcome. Even after the *Report and Order* was adopted, a party would have to make many assumptions about the Commission's intentions and the Transition Administrator's future decisions to conduct such an analysis. During the rulemaking, there was no way for interested parties to conduct such independent analyses.

While the *Notice* was adequate for the adoption of certain portions of the *Report and Order*, it was not adequate for the adoption of the new band plan in its entirety. Collectively, the *Notice*, the comments and reply comments in the proceeding, the *ex parte* submissions in the proceeding, and the *Report and Order* all fail to provide sufficient engineering analysis. Stated another way, there was no "cure" for the deficiencies of the *Notice* in this rulemaking proceeding by virtue of public participation. There is not sufficient engineering analysis anywhere in the record of this proceeding through comments, reply comments or *ex parte* submissions.

The engineering analysis with detailed frequency assignments and frequency coordination is yet to be conducted. Consequently, the public does not know whether the amount of spectrum in the band plan adopted is adequate to ensure no degradation in service for the affected licensees, or if there is to be a differential impact among licensees, that fact should be made known to the public and should be justified under the governing statutes. Moreover, there is no requirement that the Transition Administrator envisioned by the *Report and Order* conduct such analysis in order to optimize the outcome of the reconfiguration of the band in a fair and equitable manner for all licensees. There was no assessment of the impact of the first-come-first-served policy on the spectrum available to incumbent SMR licensees. As a matter of

fact, the outcome of the new band plan is a variable in the hands of the Transition Administrator and remains unknown to all interested parties. There are many different potential outcomes of the new band plan on various licensees, depending on what the Transition Administrator decides to do in giving priority to the elimination of interference to Public Safety. Those potential outcomes have never been described and interested parties were not provided notice and an opportunity to be heard. The Joint Petitioners could not assess the likely outcome of proposed rule changes affecting their service authorizations in the absence of such information.

In this vacuum of technical information, no licensee could meaningfully participate in the rulemaking proceeding because no licensee could assess the relative impact of the proposed methods or rule changes on their authorized service. Because all 800 MHz licenses are not equal – coverage and interference are variables – licensees need to know whether the new band plan deprives them of coverage after the transition. Due to the lack of information in the *Notice* and in the *Report and Order*, no licensee can know this critical information. Hence, the outcome on individual licensees remains unstated and is apparently unknown. The vague assurance of "comparable facilities," as previously noted, is a wholly-inadequate substitute for this missing information.

III. WITHOUT DUE PROCESS THE NEW BAND PLAN DEPRIVES THE JOINT PETITIONERS OF THEIR PRIOR RIGHT TO IMPLEMENT CELLULAR-LIKE INFRASTRUCTURE

Before the *Report and Order* was adopted, the Joint Petitioners were free to change their operational configuration from high-site facilities to cellular-like facilities.[10] Indeed, it was this regulatory and technical flexibility that provided the economic incentive for Coastal/A.R.C.'s participation in two of the Commission's spectrum auctions. As noted in

[10] *See* 47 C.F.R. § 90.693.

Coastal/A.R.C.'s recent Comments, Coastal/A.R.C. intended to exercise its rights under the Commission's rules and build a cellular-like system, once the regulatory uncertainty surrounding the *800 MHz Rebanding* had been settled. Instead, these rights have been taken from the Joint Petitioners without notice. This was a wholly unexpected development, as it is completely inconsistent with the licensing framework that has developed for SMR licenses and other CMRS providers.

Previously, the licensing framework that governed incumbent SMR operators in the 800 MHz band was that which grew out of a set of rules first adopted in 1994.[11] In December 1995, the Commission adopted a wide-area geographic area licensing approach for SMR systems operating in the 800 MHz frequency band.[12] As part of this licensing approach, the Commission adopted construction and coverage requirements for Economic Area (EA)[13] licensees similar to those required of broadband Personal Communications Services (PCS) and 900 MHz band SMR licensees.[14] At that time, contiguous blocks of spectrum throughout

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[11] *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Further Notice of Proposed Rule Making*, PR Docket No. 93-144, PP Docket No. 93-253, 10 FCC Rcd 7970 (1994) ("*Further Notice*").

[12] *See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, *Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, *First Report and Order, Eighth Report and Order and Second Further Notice of Proposed Rulemaking,* 11 FCC Rcd 1463 (1995) ("*800 MHz Report and Order*"). Prior to the adoption of geographic licensing, qualified applicants were awarded licenses on a site-by-site, channel-by-channel basis.

[13] *See* Final Redefinition of the BEA Economic Areas, 60 Fed. Reg. 13114 (March 10, 1995). There are a total of 175 Economic Areas. *See* 47 C.F.R. § 90.7 [*Economic Areas (EAs)*.]

[14] *800 MHz Report and Order* at 1521 ¶ 104. The Commission had previously determined that interconnected SMR services fell within the new category of mobile services known as commercial mobile radio services (CMRS), such as cellular and broadband PCS licensees. *See Implementation of Sections 3(N) and 332 of the Communications Act,* GN Docket No. 93-252, *Second Report and Order,* 9 FCC Rcd 1411, 1448-58 (1994); *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Third Report and Order,* 9 FCC Rcd 7988, 8042-43 (1994) ("*Third Report and Order*").

defined service areas were awarded to single licensees in these services on an exclusive basis.[15] This stood in contrast to the site-based licenses which were held by incumbent SMR operators. In an effort to achieve the regulatory parity mandated by Congress, the Commission adopted further changes to its rules.

One important change to create regulatory parity was the adoption of Section 90.693 of the Commission's rules, which permitted incumbent SMR 800 MHz licensees to add, remove, or modify transmitter sites within a certain field strength contour of their existing systems. This had the practical effect of providing incumbent SMR licensees with the capacity to provide the same cellular digital service as the holders of EA authorizations in the same markets. In fact, once an incumbent SMR operator brought multiple sites online through this mechanism, it was eligible to convert its existing high-site SMR licenses into geographic area licenses.[16] The *800 MHz Rebanding Report and Order*, with neither notice nor comment, eliminated this substantial right of many, if not most incumbent SMR licensees.

This action stands in stark contrast to previous Commission actions regarding the SMR service. When the Commission adopted Section 90.629, which permitted additional time for existing SMR licensees to build out their existing high-site licenses to provide digital cellular service, the Commission stated: "[t]his new scheme is not designed to benefit any particular entity, but to provide opportunities for a variety of licensees of different sizes to participate in the

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[15] *Third Report and Order*, 9 FCC Rcd 7988, 8042 ¶ 94 (1994).

[16] See § 90.693(d)(1) ("Spectrum blocks A through V. Incumbent licensees operating at multiple sites may, after grant of EA licenses has been completed, exchange multiple site licenses for a single license, authorizing operations throughout the contiguous and overlapping 40 dBmV/m field strength contours of the multiple sites. Incumbents exercising this license exchange option must submit specific information on Form 601 for each of their external base sites after the close of the 800 MHz SMR auction. The incumbent's geographic license area is defined by the contiguous and overlapping 22 dBmV/m contours of its constructed and operational external base stations and interior sites that are constructed within the construction period applicable to the incumbent. Once the geographic license is issued, facilities that are added within an incumbent's existing footprint and that are not subject to prior approval by the Commission will not be subject to construction requirements.")

provision of wide-area service."[17] The fruits of the Commission's efforts to achieve regulatory parity were further realized with the Commission's auction of 800 MHz spectrum, and many existing high-site SMR providers (including Joint Petitioners) participated. Many auction participants, including Joint Petitioners, were drawn by the Commission's promise that "800 MHz licensees may provide analog or digital services used for voice communications, paging, data, and facsimile services."[18]

Suddenly and abruptly, the Commission took these rights away from the Joint Petitioners and similarly situated licensees. Specifically, the rights of incumbent SMR high-site licensees to modify their systems as provided for under Section 90.693 to provide cellular-type digital services have been completely eliminated by the *Report and Order*. Further, this is wholly an *implicit* outcome of the rulemaking. It results from the fact that the Joint Petitioners are assigned to a part of the new band plan where cellular infrastructure is prohibited. Forevermore, they will be locked into a high-site configuration. There is no discussion of, or justification for, this harsh decision in the *Report and Order*.

There was never any public notice of the Commission's intention to take these rights away from these licensees. There was never a public notice providing such licensees with a deadline for constructing cellular-like infrastructure before these rights were taken away. Clearly, the due process rights of the Joint Petitioners have been violated. Their licenses have been modified to remove the right to utilize cellular-like technology without notice and an opportunity to be heard. The *Report and Order* asserts the Commission's broad authority to

[17] *800 MHz Report and Order* at 1479 ¶ 14.

[18] *See FCC Factsheet for Auction 34.*

modify existing licenses.[19] However, this authority cannot be exercised without due process of law, and the right is not unlimited – it is clearly circumscribed by the separate statutory mandate to maintain regulatory parity among cellular, PCS, and SMR licensees; the Commission's obligation to comply with the APA and the Constitution.[20]

On this point, the *Report and Order* again runs afoul of the APA, which requires the Commission to publish substantive rule changes for comment prior to adoption. Section 553 of the APA imposes specific requirements on an agency that is involved in "rule making."[21] The substantive revision of 47 C.F.R. § 90.693 clearly falls within the statutory definition of rule making.[22] Therefore, Section 553 governs the procedures that the Commission must use to repeal or revise that rule.[23] The Commission has not complied with these procedures.

Courts applying Section 553 of the APA generally refer to rules requiring notice and comment as "substantive rules."[24] In general terms, case law has defined "substantive rules" as those that effect a change in existing law or policy or which affect individual rights and

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[19] *See 800 MHz Rebanding Report and Order*, at paras. 12, 65-74.

[20] For a general discussion of the constitutional limitations upon the FCC's authority to modify licenses under Section 316, see William L. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 Federal Communications Law Journal 2, 13-23 (1997) ("*Fishman*"); *see also* Preferred Communications, Inc.'s March 2, 2004 filed Ex Parte Notice at p. 29, n. 58, and p. 36 of its December 2, 2004 filed Comments.

[21] *See* 5 U.S.C. §§ 551(4) and 551(5).

[22] *See* 5 U.S.C. § 551(5) (1994).

[23] The Commission's failure to comply with these requirements clearly falls within the jurisdiction of the D.C. Circuit Court of Appeals, and thus that court may directly review the Commission's repeal of 47 U.S.C. § 90.693.

[24] *See, e.g.* Animal Legal Defense Fund v. Quigg , 932 F.2d 920, 927 (Fed. Cir. 1991) ("*Animal Defense Fund*"). The Administrative Procedure Act provides: "(a) General Notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual Notice thereof in accordance with law. [. . . .] (c) After Notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments [. . .]." 5 U.S.C. § 553 (1994).

obligations.[25] The Commission's actions here certainly alter individual rights and obligations. Therefore, Section 553 of the APA required the Commission to provide the public with notice of, and an opportunity to comment on, the Commission's intention to eliminate the substantive right of incumbent SMR licensees to modify their facilities to provide cellular digital services. In other words, an existing right – the right to provide digital services for voice communications – has now been taken away from the Joint Petitioners by the *800 MHz Rebanding Report and Order* without due process of law. Nowhere in the Commission's *Notice* for the *800 MHz Rebanding* proceeding did it provide 800 MHz SMR licensees with notice that the Commission intended to modify their licenses in such a fundamentally disabling manner.

Thus, in eliminating a substantial right of incumbent SMR licensees – without providing any notice, either explicit or constructive – the Commission violated Section 553 of the APA. The adverse economic impact of this rule change on the Joint Petitioners is enormous. Covertly and by fiat, the Commission has completely undermined the business plan of spectrum-auction winners and devalued all of their spectrum assets in the marketplace. It is impossible to view this outcome as fair and even-handed, especially in the face of the preferential treatment afforded to Nextel and others in this rulemaking proceeding.

IV. THE COMMISSION EXCEEDED ITS STATUTORY AUTHORITY IN COMPENSATING NEXTEL WITH PREFERENTIAL ACCESS TO SPECTRUM

The Commission lacks statutory authority to compensate Nextel with an exclusive and preferential award of spectrum. Nextel is *not only* getting spectrum in exchange for the spectrum it is to vacate just like other SMRs; it is being *further compensated* by the Commission with additional spectrum for "facilitating band reconfiguration, giving up spectrum rights, and

[25] *See Animal Defense Fund* at 927.

bearing the financial burden of the relocation process for all affected incumbents."[26] An illustration of the compensation scenario is set forth in Exhibit Two, attached hereto. The Commission's compensation of Nextel is explicit: "We conclude that it is in the public interest to compensate Nextel for the surrendered spectrum rights and costs it incurs as a result of band reconfiguration."[27] Nowhere does the *Report and Order* provide any statutory justification for the Commission's assertion of power to compensate certain licensees for such voluntary undertakings.

The *Report and Order*'s discussion of its statutory authority appears to assert sweeping authority under the public interest provisions of the Communications Act, 47 U.S.C §§ 303 and 151. However, those sections are intended to give the Commission authority to carry out the specific duties with which it is charged by other enabling statutes. Sections 303 and 151 do not stand independently as a source of statutory authority upon which the FCC can base any action. A finding that an action is in the public interest does not mean that the Commission can simply take that action, unless the Commission has statutory authority to act in the specific manner contemplated.

In Motion Picture Ass'n of America v. FCC, the Court of Appeals for the DC Circuit made this point very clearly when it struck down the FCC's video description rules.[28] In response to the Commission's claim that its authority to require video description by broadcasters rested in its inherent authority to carry out the public interest, the court replied:

> The FCC cannot act in the "public interest" if the agency does not otherwise have the authority to promulgate the regulations at issue.

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[26] *Report and Order* at 31.

[27] *Report and Order* at 31, 211.

[28] *See* Motion Picture Ass'n of America v. FCC, 309 F.3d 796 (D.C. Cir. 2002) ("MPAA v. FCC").

> An action in the public interest is not necessarily taken to "carry out the provisions of the Act," nor is it necessarily authorized by the Act. The FCC must act pursuant to delegated authority before any "public interest" inquiry is made under Section 303(r).[29]

The Commission has overstepped its statutory authority because Congress has not given the Commission the discretion to compensate *any* licensee for *anything*. A review of the history of *all* of the band-clearing initiatives sanctioned by the Commission to date reveals one important common element – the Commission did not compensate *any* licensee. *Licensees* compensated other *licensees*. The Commission set the ground rules for such compensation, and all similarly-situated licensees were treated equally. Here, the Commission has accepted an offer from one licensee to pay relocation costs to other licensees, and then granted that licensee a spectrum "credit" for the spectrum that licensee is to vacate, plus an *additional* spectrum credit for good conduct! Not only is such an arrangement unprecedented, it is an illegal and *ultra vires* act beyond the statutory powers of the Commission.

V. THE COMMISSION'S COMPENSATION OF NEXTEL DESTROYS THE REGULATORY PARITY MANDATED BY SECTION 332

Assuming, *arguendo*, that the Commission had the requisite statutory authority to compensate Nextel, it cannot do so in violation of Section 332, which requires that the Commission maintain regulatory parity among 800 MHz EA and SMR licensees as well as between SMR, cellular and PCS services. The *Report and Order's* structure for the *800 MHz Rebanding* is based entirely upon a new method of classifying licensees, rather than upon the existing categories of licenses. Footnote 5 of the *Report and Order* adopts a new definition for an "800 MHz Cellular System."[30] Through a reference to paragraph 172 of the *Report and Order*, the Commission defined for the first time "800 MHz Cellular System" as "a system

[29] MPAA v. FCC, at 801.
[30] *Report and Order* at 2, n.5.

having more than five overlapping interactive sites featuring hand-off capability;" and "any one of such sites has an antenna height of less than 100 feet above ground level with an antenna height above average terrain (HAAT) of less than 500 feet and more than twenty paired frequencies." Similarly, a new definition was adopted for "Non-cellular systems."[31] Footnote 9 defines "Non-cellular" systems as "systems that provide service to their mobile users or subscribers from one or a small number of base stations, which are typically "high site" (*i.e.*, located at high elevations, on towers, mountains, hill tops, or tall buildings) multiple, interconnected, multi-channel transmit/receive cells and employ frequency reuse to serve a larger number of subscribers." Non-cellular refers to systems which do not employ a "high-density cellular" architecture."[32]

Section 332 directs the Commission to maintain regulatory parity among cellular, PCS, and SMR licensees (all of whom are Commercial Mobile Radio Service ("CMRS") providers).[33] The 1993 amendments to Section 332 ensure similar regulatory treatment for similar services. The Commission's Report and Order implementing the 1993 amendments acknowledges Congress's instruction to "ensure that economic forces – not disparate regulatory

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[31] *Report and Order* at 2, n.9.

[32] Footnote 42 in the *Report and Order* adds further gloss to these new definitions: "The designations "high-site" and "low-site" are often used to distinguish cellularized from non-cellularized systems. Thus, for example, the typical public safety 800 MHz system will employ one, or only a few, base stations with antennas located on high terrain, towers, buildings, etc. to provide wide-area coverage from the base station. Cellular-architecture systems, by comparison, make use of multiple, localized coverage, base stations whose antennas generally are mounted on low towers or other structures. We note, however, that the term "low-site" is often used to denominate cells within a cellularized system that have very low antenna elevations, e.g. thirty-feet and, accordingly, have a greater potential to cause interference than high-elevation cells in the system." *See also, Report and Order* ¶¶ 170-174.

[33] *See* Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66 § 6002(d)(3)(B) (requiring that the Commission "assure that licensees in such service are subjected to technical requirements that are comparable to the technical requirements that apply to the licensees that are providers of substantially similar common carrier services"), 107 Stat. 312, 397 (1993), 47 USC § 332(c).

burdens – shape the development of the CMRS marketplace."[34] Not only has the Commission adopted new regulatory license status definitions without notice and comment in violation of the APA, it has used this definitional system to circumvent the statutory requirements of Section 332, drawing illegal distinctions between the entities to which it is required to grant regulatory parity. Providing Nextel/SouthernLINC with preferential additional spectrum as "compensation" while categorically reclassifying Nextel's competition to remove their right to implement cellular systems is a direct violation of the statute.

In 1994, the Commission itself found that symmetrical regulation for competing wireless carriers would be needed to avoid "potentially distorting effects on the market" (*i.e.*, harm to competition). The courts, as well as the Commission, have continued to recognize the Commission's duty to provide equal treatment to licensees within the same service. In Fresno Mobile Radio, Inc. v. FCC, the Court of Appeals for the D.C. Circuit held that the Commission could not discriminate among similarly situated EA licensees and the holders of Extended Implementation Authorizations ("EIA") with respect to construction requirements, as it had not articulated a reasonable basis for the disparity in treatment.[35] Accordingly, the Commission may not adopt a system of categorical discrimination among SMR licensees in the *800 MHz Rebanding* process. The Commission must revise its new band plan to treat *all* CMRS licensees in a similar manner.

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[34] *See also Ex Parte* Presentation of Southern Communications Services, Inc., page 3, n. 6, filed June 23, 2004.

[35] 165 F.3d 965 (D.C. Cir. 1999)("*Fresno Mobile Radio*").

VI. THE COMMISSION'S ILLEGAL COMPENSATION OF NEXTEL IS UNFAIR TO OTHER LICENSEES AND DEPRIVES THE UNITED STATES TREASURY OF AUCTION REVENUE

Compensation of Nextel with spectrum illegally circumvents the requirements for auctions.[36] An auction would not be required if the spectrum were used in an even-handed allocation to an existing service for the relocation of licensees within that service. However, the Commission is not doing that – it is using the 1.9 GHz spectrum to *compensate* Nextel on a preferential basis. The Joint Petitioners urge the Commission to recognize this important distinction on reconsideration. Spectrum may be used to relocate incumbents in an even-handed manner across a given service without triggering an auction, but the compensation of particular licensees with preferential awards of spectrum is illegal.

CONCLUSION

With the best of intentions, the Commission has adopted a new band plan to solve an important public safety interference problem. However, the course taken, if not corrected on reconsideration, will result in a failure to meet the expectations of the public safety community, harm competition, and result in time-consuming and costly appeals and remands causing needless delay. Joint Petitioners seek reconsideration of the issues set forth above and request that on reconsideration the Commission suspend its new band plan until: (1) the proper engineering analysis is conducted and made public; (2) the Commission and all affected licensees can determine whether the spectrum allocated in the new band plan is adequate to

[36] We note that other parties to this proceeding have raised significant issues regarding the Commission's actions under the Anti-Deficiency Act and Miscellaneous Receipts Act, and further note that the Commission has not satisfactorily addressed these issues in the *Report and Order*. To the extent that the Commission continues on the present course to award spectrum as compensation to Nextel on a preferential basis, these arguments of statutory violations remain relevant.

provide a sufficient degree of service replication for all the affected 800 MHz licensees; (3) a Further Notice of Proposed Rule Making is issued setting forth a specific table of assignments as described above; and (4) a band plan is adopted without the unlawful preferential feature of the current plan.

At least one Further Notice of Proposed Rulemaking is necessary to adopt a new band plan – one with the missing engineering analysis described above. The specific channel assignments should be proposed in detail, with the outcome of frequency coordination specified. Replication statistics should be provided. Most importantly, the method used by the Commission to make specific channel assignments must be transparent, and subject to public comment. All SMR licensees should then be afforded the opportunity to participate in the benefits and burdens of the 800 MHz Rebanding on an equal basis. Ultimately, unless the proper engineering analysis is developed as a basis for the solutions adopted, and the legal infirmities are cured, licensees of all types will be harmed – Public Safety, CII, B/ILT, and SMR alike.

Respectfully submitted,

JOINT PETITIONERS COASTAL SMR
NETWORK, L.L.C./A.R.C., INC. AND
SCOTT C. MACINTYRE

By: _____

Julian L. Shepard
Mark Blacknell
Williams Mullen, A Professional Corporation
1666 K Street, N.W., Suite 1200
Washington, DC 20006-1200
(202) 833-9200
Their Attorneys

December 22, 2004

EXHIBIT ONE

Comments of Coastal SMR Network, L.LC.

Federal Communications Commission

The FCC Acknowledges Receipt of Comments From ...

Coastal SMR Network, L.L.C.

...and Thank You for Your Comments

Your Confirmation Number is: '2004122234933 '	
Date Received:	**Dec 2 2004**
Docket:	**02-55**
Number of Files Transmitted: 1	

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updated 12/11/03

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Improving Public Safety Communications	)	WT Docket No. 02-55
In the 800 MHz Band	)	
	)	
Consolidating the 900 MHz Industrial/Land	)	
Transportation and Business Pool Channels	)	
	)	

COMMENTS OF COASTAL SMR NETWORK, L.L.C.

Coastal SMR Network, L.L.C. and its affiliates ("Coastal"), licensees of 27 EA and 138 high-site Specialized Mobile Radio Service ("SMRS") authorizations in the Mid-Atlantic region,[1] by its attorneys, hereby submit its Comments on certain *ex parte* presentations by Nextel Communications, Inc. ("Nextel") and other parties in the above-captioned proceeding (the "*800 MHz Rebanding*") in response to the Public Notice released by the Commission on October 22, 2004.[2] The Commission's August 6, 2004 *Report and Order* in this proceeding adopts rules for the relocation of Public Safety and non-Public Safety licensees in the frequencies 806 to 824 MHz and 851 to 869 MHz (the "800 MHz Band").[3] The new 800 MHz band plan greatly favors Nextel to the detriment of Coastal and many other Nextel competitors in the 800 MHz Band. By depriving Coastal and other non-Nextel incumbents of the ability to implement

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[1] A listing of licenses held by Coastal and its affiliates, Commercial Radio Service Corp. and A.R.C., Inc. d/b/a Antenna Rentals Corp., is attached hereto as Exhibit A.

[2] *Commission Seeks Comment on Ex Parte Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding*, FCC 04-253, rel. October 22, 2004.

[3] *See* Improving Public Safety Communications in the 800 MHz Band, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, et. Al, FCC 04-168 (rel. August 6, 2004) ("*Report and Order*").

cellular architecture in the future with (non-EA) licenses currently in a high-site configuration, the new rules greatly diminish the economic value of Coastal's and other non-Nextel licensees' spectrum resources, while permanently locking non-Nextel incumbents into a position where they cannot compete effectively with Nextel.

The many legal and policy infirmities in the *800 MHz Rebanding* are beyond the scope of these Comments. Those issues resulting in unlawful and inequitable treatment of Coastal will be presented for timely reconsideration by the Commission. These Comments are limited to the further proposals and revisionist clarifications in Nextel's *ex parte* submissions, adoption of which would only exacerbate the problems and inequities in the new band plan.

I. THE NEWLY-ADOPTED BAND PLAN THWARTS NEXTEL'S COMPETITORS WHO PLAN TO "CELLULARIZE" THEIR SYSTEMS.

Over the past 30 years, Coastal built a substantial communications system utilizing 138 site-based SMRS licenses in the 800 MHz Band throughout the Mid-Atlantic region. As the regulatory structure permitted and technology developed, Coastal recognized the opportunity to convert its high-site facilities into a cellular-type system to compete more effectively with Nextel. However, in order to implement such a system, Coastal required additional spectrum. The Commission's Spectrum Auctions 34 and 36 presented the opportunity to acquire most of the necessary spectrum. In those auctions, Coastal acquired 27 EA licenses in the same and contiguous geographic areas as its existing site-based licenses.

Coastal's intention was to convert its high-site facilities to cellular infrastructure in an integrated system utilizing not only the spectrum acquired in Auctions 34 and 36, but additional spectrum where needed to be acquired in the secondary market. Coastal's intentions in this regard were manifest not only in the nearly $800,000 it paid in the auctions, but in its retention of Performance Industries, a leading consulting firm in the SMRS industry, to assist in

the cellular system design and implementation. *See* Letter from Performance Industries attached hereto as Exhibit B. Adverse economic conditions in the aftermath of September 11, 2001, coupled with the regulatory uncertainty following Nextel's November 2001 "White Paper" (petitioning the FCC to reconfigure the 800 MHz land mobile radio band to rectify interference and to allocate additional spectrum to meet public safety needs), retarded investment in Coastal's digital-cellular conversion. As a result, Coastal was temporarily unable to go forward with the construction of a cellular system until the investment climate improved and the spectrum variables were resolved.

The *Report and Order* adopts a band plan that does not accommodate Coastal's site-based facilities into a band-segment where cellular systems can operate. Without adequate public notice, the Commission changed the existing flexibility of the site-based licenses, eliminating the ability of licensees to upgrade to digital cellular technology. Apparently, only Coastal's EA authorizations will be accommodated in the cellular portion of the new band plan. It remains to be seen where in the cellular portion of the new band plan those EA licenses ultimately will be relocated. The result is a huge reduction in the utility and economic value of both Coastal's site-based licenses and the spectrum acquired by Coastal at auction.

II. NEXTEL'S FURTHER PROPOSALS AFFECTING THE PLACEMENT OF INCUMBENTS (OTHER THAN NEXTEL, NEXTEL PARTNERS, AND SOUTHERN LINC) SHOULD NOT BE ADOPTED.

The inequities in the Commission's new band plan would be sharpened if the proposals in Nextel's *ex parte* presentations are implemented. Each time Nextel refers to "incumbents" other than "Nextel and Southern LINC" in its *ex parte* communications, Nextel proposes to further harm Nextel's competitors. For example, Nextel advocates that incumbent

B/ILT or SMR licensees (other than Nextel and Southern LINC) need not be relocated from channels 121-150.[4] Of course, if they are not relocated, they cannot implement cellular systems in the future. They will be forever locked into high-site configurations in the new band plan. Moreover, Nextel advocates that incumbents (other than Nextel and Southern LINC) that elect to be relocated out of the non-cellular channel block be subject to a packing plan starting at 861.9875 MHz. This, of course, would place Nextel's competitors into a secondary guard band, leaving Nextel to claim the best spectrum on a preferential basis. Simply put, these proposals worsen the inequities in the new band plan and should not be adopted.

III. CONCLUSION

For those reasons, Coastal urges the Commission to reject the further modifications to the new band plan advocated by Nextel.

Respectfully submitted,

COASTAL SMR NETWORK, L.L.C.

By: _____

Julian L. Shepard
Mark Blacknell
Williams Mullen, A Professional Corporation
1666 K Street, N.W., Suite 1200
Washington, DC 20006-1200
(202) 833-9200
Its Attorneys

December 2, 2004

[4] Nextel Letter of September 16, 2004, at p. 2.

Summary of EA & License Holdings for...

Commercial Radio Service Corp.

A.R.C., Inc.
dba Antenna Rentals Corp.

Coastal SMR Network, LLC

October 2004

EXHIBIT A

EA LICENSE SUMMARY:

Call Sign	EA	EA Description	Block	Channels	# Chnls	Date of Auction	$ Pd at Auction	2000 POPs
WPRV491	EA 014	Salisbury, MD-DE-VA	F	853.5125-854.1125	25	9/6/2000	$ 20,150	363,970
WPSA396	EA 014	Salisbury, MD-DE-VA	R	856,857,858,859,860.5875	5	12/7/2000	$ 1,235	363,970
WPSA401	EA 014	Salisbury, MD-DE-VA	T	856,857,858,859,860.6375	5	12/7/2000	$ 975	363,970
WPRV489	EA 015	Richmond-Petersburg, VA	E	852.2625-852.8625	25	9/6/2000	$ 108,550	1,446,123
WPSA383	EA 015	Richmond-Petersburg, VA	H	856,857,858,859,860.0375	5	12/7/2000	$ 10,400	1,446,123
WPSA393	EA 015	Richmond-Petersburg, VA	Q	856,857,858,859,860.5625	5	12/7/2000	$ 7,150	1,446,123
WPSA397	EA 015	Richmond-Petersburg, VA	S	856,857,858,859,860.6125	5	12/7/2000	$ 14,950	1,446,123
WPSA386	EA 016	Staunton, VA-WV	K	856,857,858,859,860.1125	5	12/7/2000	$ 8,450	334,087
WPSA394	EA 016	Staunton, VA-WV	Q	856,857,858,859,860.5625	5	12/7/2000	$ 5,525	334,087
WPSA387	EA 017	Roanoke, VA-NC-WV	K	856,857,858,859,860.1125	5	12/7/2000	$ 5,070	826,284
WPSA390	EA 017	Roanoke, VA-NC-WV	L	856,857,858,859,860.1375	5	12/7/2000	$ 8,450	826,284
WPSA395	EA 018	Greensboro-Winston Salem-High Point, NC-VA	Q	856,857,858,859,860.5625	5	12/7/2000	$ 20,150	1,854,853
WPSA398	EA 018	Greensboro-Winston Salem-High Point, NC-VA	S	856,857,858,859,860.6125	5	12/7/2000	$ 16,900	1,854,853
WPSA403	EA 018	Greensboro-Winston Salem-High Point, NC-VA	V	856,857,858,859,860.6875	5	12/7/2000	$ 8,450	1,854,853
WPSA388	EA 019	Raleigh-Durham-Chapel Hill, NC	K	856,857,858,859,860.1125	5	12/7/2000	$ 22,750	1,831,510
WPSA391	EA 019	Raleigh-Durham-Chapel Hill, NC	L	856,857,858,859,860.1375	5	12/7/2000	$ 11,050	1,831,510
WPSA402	EA 019	Raleigh-Durham-Chapel Hill, NC	U	856,857,858,859,860.6625	5	12/7/2000	$ 38,350	1,831,510
WPRV490	EA 020	Norfolk-Virginia Beach-Newport	EE	852.8875-853.4875	25	9/6/2000	$ 208,000	1,722,764
WPSA385	EA 020	Norfolk-Virginia Beach-Newport News, VA-NC	I	856,857,858,859,860.0625	5	12/7/2000	$ 31,200	1,722,764
WPSA399	EA 020	Norfolk-Virginia Beach-Newport News, VA-NC	S	856,857,858,859,860.6125	5	12/7/2000	$ 1,040	1,722,764
WPRV492	EA 021	Greenville, NC	FF	854.1375-854.7375	25	9/6/2000	$ 61,750	823,517
WPSA389	EA 021	Greenville, NC	K	856,857,858,859,860.1125	5	12/7/2000	$ 29,900	823,517
WPRV493	EA 022	Fayetteville, NC	FF	854.1375-854.7375	25	9/6/2000	$ 53,300	528,224
WPSA384	EA 022	Fayetteville, NC	H	856,857,858,859,860.0375	5	12/7/2000	$ 37,050	528,224
WPRV494	EA 025	Wilmington, NC-SC	FF	854.1375-854.7375	25	9/6/2000	$ 35,750	878,267
WPSA392	EA 026	Charleston-North Charleston, SC	L	856,857,858,859,860.1375	5	12/7/2000	$ 3,900	587,297
WPSA400	EA 026	Charleston-North Charleston, SC	S	856,857,858,859,860.6125	5	12/7/2000	$ 20,800	587,297
					255		**$ 791,245**	

SITE-BASED LICENSE SUMMARY:

Call Sign	EA	EA Description	Channels	# Chnls
WPGC449	14	BELLE HAVEN, VA	851.0875	1
WPGD653	14	BELLE HAVEN, VA	854.4375	1
WPGJ612	14	BELLE HAVEN, VA	851.1875	1
WPGJ613	14	BELLE HAVEN, VA	851.3375	1
WPXR374	15	RICHMOND, VA	856,857,858,859.3125	4
WPGD465	19	HENDERSON, NC	853.2875	1
WNXS388	20	VIRGINIA BEACH, VA	855,856,857,858,859,860.6125	6
WPAI798	20	VIRGINIA BEACH, VA	856,857,858,859,860.6875	5
WPEA277	20	SMITHFIELD, VA	851.1875	1
WPFC790	20	VIRGINIA BEACH, VA	856,857,858,859,860.0625	5
WPFE527	20	HAMPTON, VA	854.3625	1
WPFU496	20	FRANKLIN, VA	851.1125	1
WPFV465	20	AHOSKIE, NC	853.5625	1
WPFV467	20	COINJOCK, NC	854.7375	1
WPFV468	20	AHOSKIE, NC	853.6625	1
WPFV649	20	FRANKLIN, VA	853.4875	1
WPFV704	20	HAMPTON, VA	851.1625	1
WPFV705	20	FRANKLIN, VA	854.4625	1
WPFV707	20	ELIZABETH CITY, NC	854.5125	1
WPFV709	20	ELIZABETH CITY, NC	853.2625	1
WPFV852	20	ELIZABETH CITY, NC	854.0375	1
WPFV924	20	COINJOCK, NC	852.2875	1
WPFV929	20	COINJOCK, NC	853.3875	1
WPFV961	20	COINJOCK, NC	851.5125	1
WPFV962	20	WINFALL, NC	853.3625	1
WPGC357	20	AHOSKIE, NC	851.8875	1
WPGC739	20	NEWPORT NEWS, VA	855.7625;858,859.7875	3
WPLP771	20	EDENTON, NC	856,857,858,859,860.3125	5
WPMJ841	20	NEWPORT NEWS, VA	851,854.5125;852.2875;852.5625;853.0125;853.3875;853.6625; 853.8375;854.8125;855.0625;856,857.9125	12
WPMN633	20	VIRGINIA BEACH, VA	856,857,858,859.7875	4
WPNP446	20	CHESAPEAKE, VA	856,857,858,859.7875	4
WPEX902	21	BUXTON, NC	856,857,858,859,860.0125	5
WPFF766	21	WINDSOR, NC	852.5625	1
WPFF768	21	WINDSOR, NC	853.0125	1
WPHQ295	21	NEW BERN, NC	852.2625	1
WPLP933	21	WANCHESE, NC	851.2875;851.7125;852.0125;852.4375;852.9125;853.2375;853.5875; 853,859.8125;854.1625	10
WPTH683	21	KITTY HAWK, NC	851.0625;854.7125, 856,857,858.1125	5
WPGD453	25	GEORGETOWN, SC	854.2125	1
WPGD455	25	FLORENCE, SC	853.4125	1
WPGD460	25	FLORENCE, SC	852.3625	1
WPGD461	25	FLORENCE, SC	852.4875	1

SITE-BASED LICENSE SUMMARY (Cont.):

Call Sign	EA	EA Description	Channels	# Chnls
WPGD463	25	GEORGETOWN, SC	854.2625	1
WPGD543	25	GEORGETOWN, SC	854.3875	1
WPGD656	25	FLORENCE, SC	853.3625	1
WPGD848	25	FLORENCE, SC	853.6375	1
WPGG291	25	GEORGETOWN, SC	854.3625	1
WPGJ654	25	GEORGETOWN, SC	851.7625	1
WPGD443	26	CHARLESTON, SC	854.4125	1
WPGD444	26	CHARLESTON, SC	854.5125	1
WPGD445	26	MOUNT PLEASANT, SC	854.5875	1
WPGD451	26	MOUNT PLEASANT, SC	854.5625	1
WPGD452	26	CHARLESTON, SC	851.2125	1
WPGD454	26	FROGMORE, SC	854.3625	1
WPGD456	26	MOUNT PLEASANT, SC	854.1375	1
WPGD464	26	FROGMORE, SC	854.3875	1
WPGD466	26	CHARLESTON, SC	854.1625	1
WPGD475	26	MOUNT PLEASANT, SC	854.5375	1
WPGD542	26	FROGMORE, SC	854.2125	1
WPGD544	26	CHARLESTON, SC	854.1875	1
WPGD545	26	FROGMORE, SC	854.2625	1
WPGD845	26	MOUNT PLEASANT, SC	853.4625	1
WPGD541	23	CLOVER, SC	852.8625	1
WPGY441	23	CHARLOTTE, NC	851.6375	1
WPGY469	23	CHARLOTTE, NC	852.1625	1
WPGY470	23	CHARLOTTE, NC	852.3875	1
WPFZ979	24	ORANGEBURG, SC	852.1875	1
WPFZ980	24	ORANGEBURG, SC	854.0625	1
WPGD602	24	COLUMBIA, SC	852.2625	1
WPGD623	24	ORANGEBURG, SC	854.1125	1
WPGD640	24	ORANGEBURG, SC	852.5875	1
WPHE598	28	STATESBORO, GA	853.3375	1
WPHE631	28	SAVANNAH, GA	852.5625	1
WPHE638	28	SAVANNAH, GA	853.3375	1
WPHE642	28	STATESBORO, GA	852.5625	1
WPHE646	28	STATESBORO, GA	852.9375	1
WPHE654	28	SAVANNAH, GA	853.8375	1
WPHE673	28	SAVANNAH, GA	852.9375	1
WPHE674	28	SAVANNAH, GA	853.0125	1
WPFZ978	41	GREENWOOD, SC	853.4875	1
WPGD457	41	SIX MILE, SC	851.2125	1
WPGD477	41	SIX MILE, SC	853.5125	1
WPGD627	41	GREENWOOD, SC	854.0125	1
				138

EXHIBIT B

Performance
industries, LP
Consulting, Mergers & Acquisitions

November 30, 2004

Mr. Julian Shepard
Williams Mullen
1666 K Street, NW
Suite 1200
Washington, DC 20006

Dear Mr. Shepard,

Pursuant to your request, the following is a summary of Performance Industries' engagement history with John W. Harris relative to his spectrum holdings through A.R.C., Inc., Coastal SMR Network, LLC and CRSC Holdings, Inc.

Background

My client, as noted above, has provided service to the Virginia and North Carolina marketplace for more than 30 years through Specialized Mobile Radio sales and service. In an effort to expand services to the current market, in September 2000, A.R.C., Inc. purchased six blocks of 800 MHz spectrum at Auction 34 in Economic Areas 14, 15, 20, 21, 22 and 25. In December 2000, A.R.C., Inc. purchased 21 additional blocks of 800 MHz spectrum at Auction 36 in Economic Areas 14, 15, 16, 17, 18, 19, 20, 21, 22 and 26.

In March 2001, Performance Industries began providing services to Mr. Harris to expand the market services it was currently providing through the site-based licenses used in the systems of Coastal SMR Network and CRSC Holdings, which included engineering studies relative to the build out of the EA channels as provided in the FCC guidelines allowing permissible operations such as analog or digital services used for voice communications, paging, data and facsimile services. Our engineering studies included the determination of "white space" available in the EAs through 40/22 dBu service/interference contours for each of the frequencies acquired at auction. To further our efforts, Performance Industries' facilitated meetings with Motorola, ComSpace, Central Tech Wireless and others to develop a plan to build out all EAs, including the conversion to a cellular-architecture system via iDen, Harmony or similar technology.

As our engineering, market plan development and system analysis progressed throughout 2001, the unfortunate activities of September 11, 2001 transpired. Following the terrorist attacks of September 11, Nextel issued a White Paper on November 21, 2001 petitioning

600 J Eden Road, Suite 4, Lancaster, PA 17601
717.560.3704 • FAX 717.560.3707
www.performanceindustries.com

the FCC to realign the 800 MHz land mobile radio band to rectify interference through separation of cellular and non-cellular architectural systems and to allocate additional spectrum to meet critical public safety needs. In March 2002, the FCC responded to Nextel's White Paper with the adoption of a Notice of Proposed Rule Making (NPRM) to explore ways to improve the spectrum environment for public safety operations in the 800 MHz band. During this time, we constructed the EA licenses in an analog format while awaiting clarity from the FCC on its decision and anticipating beginning our expansion plan for a cellular-architecture system.

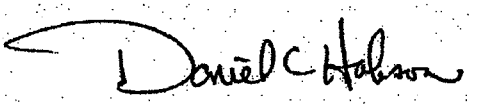
In September 2002, the Consensus Parties (including Nextel) filed their relocation plan in response to the FCC's NPRM. This plan was further edited through a Supplemental Consensus Plan filed in December 2002. The FCC issued an extension to the original NPRM in January 2003 as a result of the supplemental comments by the Consensus Parties. Again, during this time our client faced uncertainty on the implementation and capital expense relating to building a cellular architecture system until a firm decision was made by the FCC. In April 2004, our client filed comments (attached hereto) urging the Commission to adopt a balanced approach to treat all licensees fairly and allowing for the election of operation in the "cellularized" portion of the band however that is defined.

Summary

Based upon the events of 9/11, the issuance of Nextel's White Paper, and the resulting action by the FCC, our client's plans for the development of a cellular-architecture system were halted pending the FCC's decision on rebanding within 800 MHz. As the decision regarding 800 MHz band reconfiguration has taken nearly 3 years, it is unrealistic to expect the implementation of a cellular system prior to the R&O publication in the Federal Register.

Thank you for your time and consideration. If I can provide additional clarity on this matter, please feel free to contact me.

Regards,



Daniel C. Hobson
President

cc: John W. Harris
Attachment

April 8, 2004

Via Email

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, S.
Washington, DC 20554

Re: A.R.C. Inc.; WT 02-55

Dear Chairman Powell:

A.R.C. Inc. ("ARC"), as a licensee purchased, awarded and operating a network of multiple EA licenses through Auctions 34 and 36, including many site-based licenses within the 800 MHz band, wishes to communicate with urgency that ARC's 800 MHz network must receive nondiscriminatory treatment should the Commission decide to move forward with some form of rebanding in this proceeding. ARC urges the Commission to adopt the following approach:

- ARC must be allowed to operate in the "cellularized" portion of the band however that is defined. If the Commission decides to establish the cellularized band above 861 MHz ARC must be allowed to relocate its operations into this portion of the band.

- ARC and other EA licensees must be allowed to relocate to clear, contiguous spectrum throughout its operating area, either current NPSPAC or upper 200 or a combination thereof.

- The spectrum must be cleared of incumbents with fair treatment and consideration to all EA licensees. ARC and all EA licensees should be treated the same as Nextel.

- The Commission must ensure the "exchange rate" for spectrum for all concerned is non-discriminatory. ARC's spectrum must be counted in the same manner as other parties who would be relocated including Nextel and Nextel Partners. Nextel and Nextel Partners cannot be allowed to trade spectrum on one basis while all other parties are forced to accept replacement spectrum on another, less favorable, basis.

ARC respectfully requests the Commission to take these points into consideration when it moves towards a decision in this important proceeding.

Very truly yours,

A.R.C., INC.

John W. Harris

EXHIBIT TWO

The Preferential Treatment of Nextel/SouthernLINC

The *Report and Order* adopts a spectrum allocation method that results in Nextel/SouthernLINC receiving proportionally more replacement spectrum than non-Nextel/SouthernLINC licensees, in the form of a *double credit* for any 800 MHz spectrum lost. This fact is implicit in the method, though it is not explicitly described in the *Report and Order* used to calculate entitlement to replacement spectrum in the ESMR band.

For example, this is illustrated by considering the Washington-Baltimore-DC-MD-VA-WVA-PA (BEA) EA in which Nextel and an incumbent SMR licensee both have EA-wide licenses and also some site-specific licenses.

In this area, Nextel presently holds licenses for 330 EA channels while the incumbent has licenses for 100 EA channels. The new ESMR band has 320 channels including those in the guard band. Using the apportionment scheme of Footnote 444 of the *Report and Order*, Nextel would get 76.74% or licenses for 246 channels and the incumbent would get 23.26% or 74 channels. Although Nextel has a loss of 84 channels, some of these have previously been counted as relinquished and used as a credit toward 1.9 GHz spectrum so that a *double credit* would be given to Nextel for some of the channels lost. In contrast, the incumbent would receive *no* 1.9 GHz spectrum rights and only its pro rata share of replacement spectrum in the ESMR band.